U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 0 2 2015

FILE #:
PETITION RECEIPT #:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition, filed on November 13, 2006, was denied by the Director, Nebraska Service Center (Director), on October 2, 2007. The petitioner filed a timely appeal on October 31, 2007, which was dismissed on the merits by the Chief, Administrative Appeals Office (AAO), on February 12, 2010. The petitioner filed a motion to reopen and a motion to reconsider on March 29, 2010. The AAO dismissed the motion(s) on May 30, 2012 because the petitioner's filing was not executed within 33 days of the AAO's decision on the appeal, as required by applicable regulations. The petitioner filed another motion to reopen and motion to reconsider on June 27, 2012. The motion(s) will be denied.

The petitioner is an Indian restaurant. It seeks to permanently employ the beneficiary in the United States as a specialty cook pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). Under this statutory provision immigrant status may be granted to advanced degree professionals and aliens of exceptional ability whose services are sought by an employer in the United States. The petition was accompanied by a Form ETA 750, Application for Alien Employment Certification, which was filed with the U.S. Department of Labor on April 30, 2001, and certified by the DOL (labor certification) on November 3, 2003.

The Director denied the petition in 2007 on the ground that the petitioner failed to establish its continuing ability to pay the proffered wage of the specialty cook from the priority date of the petition (April 30, 2001) up to the present. We dismissed the appeal on the same ground, and on the additional ground that the minimum job requirements specified on the labor certification – a high school education and three years of experience in the job offered – did not match the requested visa classification on the petition, which is for an advanced degree professional or an alien of exceptional ability.

On the cover page of our decision dismissing the appeal in 2010 the petitioner was advised that a motion to reopen or reconsider could be filed and that the regulation at 8 C.F.R. § 103.5 contained the specific requirements. Our decision advised that "[a]ll motions must be submitted to the office that originally decided your case" and that "[a]ny motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i)."

The regulations further provide that if the decision was mailed to the petitioner, "3 days shall be added to the prescribed period" for filing a motion. 8 C.F.R. § 103.8(b). The date of filing is not the date of mailing by the petitioner, but the date of actual receipt by U.S. Citizenship and Immigration Services. *See* 8 C.F.R. § 103.2(a)(7)(i). Thus, the deadline for filing a motion in response to our dismissal decision dated February 12, 2010, was March 17, 2010.

The record shows that the petitioner initially mailed the previous motion, which consisted of the Form I-290B and supporting documentation, to the AAO, where it was stamped as received on March 15, 2010. We returned the materials to the petitioner with a letter, dated March 17, 2010, which repeated the instructions previously conveyed on the decision to **"[p]lease send your motion and fee to the U.S. Citizenship and Immigration Services (USCIS) office where you filed your original application or petition."** (Emphasis in the original.) Our letter identified the Nebraska

Service Center as the correct office for the petitioner to file a motion. The petitioner then remailed the Form I-290B and supporting materials to the Nebraska Service Center on March 26, 2010, where they were stamped as received on March 29, 2010. Thus, the previous motion(s) to reopen and reconsider were not filed until March 29, 2010, which was 47 days after the date of our decision, and two weeks after the 33-day filing deadline.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) carves out an exception for late-filed motions in certain circumstances. Specifically, the regulation provides "that failure to file before [the prescribed] period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control or the applicant or petitioner." In our view the late filing of the previous motion(s) was neither reasonable nor beyond the control of the petitioner. The cover page of our decision dated February 12, 2010 clearly stated that a motion must be filed with the office that originally decided the case – in other words, the Nebraska Service Center, not the AAO. It also clearly stated that a motion must be filed within 30 days [33 days in this case, because our decision was mailed]. The applicable regulations were cited on the cover page. Thus, the petitioner was fully apprised as to the proper office and requisite time frame for filing a motion. Nevertheless, the petitioner proceeded to mail its motion(s) to the wrong office and did not leave enough time for this error to be rectified within the 33-day filing period for motions. Based on the foregoing facts, we will not exercise our discretion under 8 C.F.R. § 103.5(a)(1)(i) to excuse the late filing of the motion(s) because the delay was not reasonable and not beyond the petitioner's control.

The regulation at 8 C.F.R. § 103.5(a)(4) provides that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, since the petitioner's previous motion(s) did not meet the filing deadline, the instant motion(s) to reopen and reconsider our dismissal of the previous motion will be denied.[1]

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. The petitioner has not met that burden with the instant motion(s).

For the reasons discussed in this decision, the petitioner's motion to reopen and motion to reconsider will be denied. Our previous decision of May 30, 2012, dismissing the motion(s) as untimely, will be affirmed. The petition remains denied.

[1] Furthermore, the motions did not fully meet another regulatory requirement. At 8 C.F.R. § 103.5(a)(1)(iii) the filing requirements are listed for motions to reopen and motions to reconsider. 8 C.F.R. 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." The motion(s) filed by the petitioner in this case omit the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). For this reason as well, therefore, the motion(s) do meet applicable requirements and must be denied under 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen and motion to reconsider is denied.